153 U.S. 538

RECORD, CASE NO. 14339.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO. 297.

JESSE SPALDING, LATE COLLECTOR OF CUSTOMS FOR THE PORT AND DISTRICT OF CHICAGO, PLAINTIFF IN ERROR,

vs.

D. CASTRO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1890.

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a United States circuit court, northern district of Illinois.

D. CASTRO
vs.
JESSE SPALDING, LATE COLLECTOR OF CUSTOMS for the port and district of Chicago. } Assumpsit.

Wm. G. Ewing, United States attorney, attorney for plaintiff in error.
Shuman and Defrees, attorneys for defendant in error.

1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, on Friday, the fourteenth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-nine, and of our independence the one hundred and thirteenth year.

WM. H. BRADLEY, *Clerk.*

D. CASTRO
vs.
JESSE SPALDING, LATE COLLECTOR OF CUSTOMS for the port and district of Chicago. } Assumpsit. 20041.

NORTHERN DISTRICT OF ILLINOIS, *ss.*:

Be it remembered that on the eleventh day of February, 1886, came the plaintiff by his attorney and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois at Chicago, in said district, his præcipe for a summons, and also at the same time filed his bond for costs in said entitled cause, which said præcipe and bond are in the words and figures following, to wit:

2 *Præcipe.*

United States circuit court, northern district of Illinois.

D. CASTRO, PLAINTIFF,
vs.
JESSE SPALDING, LATE COLLECTOR OF CUSTOMS for the port and district of Chicago, defendant.

The clerk of said court will issue a summons in the above-entitled cause in a plea of trespass on the case on promises to the damage of the plaintiff in the sum of five hundred dollars and direct the same to the marshal to execute and make it returnable to the March term of said court, A. D. 1886.

P. L. SHUMAN,
Plaintiff's Attorney.

FEBRUARY 11TH, 1886.

(Endorsed:) Filed this 11th day of Feb'y, A. D. 1886. Wm. H. Bradley, clerk.

3 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, March term, A. D. 1886.

D. CASTRO,
vs.
SPALDING, LATE COLLECTOR, &C. } In law.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against plaintiff.

Dated this 11th day of February, A. D. 1886.

P. L. SHUMAN.

(Endorsed:) Filed Feb'y 11, A. D. 1886. Wm. H. Bradley, clerk.

4 On the same day, to wit, on the eleventh day of February, 1886, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss.:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Jesse Spalding, late collector of customs for the port and district of Chicago, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto D. Castro of a plea of trespass on the case upon promises to his damage, as he alleges, of five hundred dollars; and have you then and there this writ.

Witness, the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 11th day of February, in the year of our Lord one thousand eight
5 hundred and eighty-six, and of our independence the 110th year.

[SEAL.] WM. H. BRADLEY,
Clerk.

Marshal's return.

I have served the within writ by reading the same to and within the presence and hearing of Jesse Spalding, late collector of customs for the port and district of Chicago therein named, on the 15th day of February, 1886.

F. H. MARSH,
U. S. Marshal.
By GEO. N. JONES,
Deputy.

(Endorsed :) Filed Feb'y 15, A. D. 1886. Wm. H. Bradley, clerk.

Afterward, to wit, on the sixteenth day of February, 1886, came the plaintiff by his attorney and filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit :

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss :

In the United States circuit court for the northern district of Illinois, to the March term, 1886.

6 D. Castro, plaintiff in this suit (which is a suit arising under the revenue laws of the United States, and is brought to recover duties claimed by the plaintiff to have been illegally exacted of him, and by him paid under protest), by P. L. Shuman, his attorney, complains of Jesse Spalding, late collector of customs for the port and district of Chicago, defendant herein, who was summoned, etc., of a plea of trespass on the case on promises. For that whereas the said plaintiff heretofore, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and eighty-six, at, to wit, the northern district of Illinois, made payment to the said defendant, collector as aforesaid, of a certain large sum of money, to wit, the sum of three hundred & thirty-nine dollars and ninety cents lawful money of the United States as duties, under protest and in order to obtain possession of certain merchandise imported into the United States for him, the said plaintiff, entered for consumption at the custom-house at the port of Chicago, in the district aforesaid, under the charge and control of the said defendant as such collector; and the said plaintiff avers that said sum of money above specified so paid to the said defendant, as aforesaid, as duties as aforesaid, was in excess of the amount of duties authorized by the laws of the United States to be levied, collected, and paid upon the merchandise aforesaid, and was by the said defendant collector illegally demanded and exacted of and from the said plaintiff.

7 And the said plaintiff avers that within ten days after the ascertainment and liquidation of the duties upon the merchandise aforesaid, by the proper officers of the customs, he, the said plaintiff, being dissatisfied with the decision of the said collector, gave notice in writing to the said defendant, as collector, setting forth therein distinctly and specifically the ground of his, the said plaintiff's objection thereto, and that within thirty days after the date of the said ascertainment and liquidation as aforesaid, the plaintiff appealed to the Secretary of the Treasury of the United States.

And the said plaintiff avers that the decision of the said Secretary of the Treasury has been had on said appeal, and that this suit has been brought within ninety days after the decision of the said Secretary of the Treasury on such appeal. By means whereof and by force of the statute of the United States in such case made and provided, the said defendant became liable to pay to the said plaintiff the sum of three hundred and thirty-nine dollars and ninety cents, lawful money as aforesaid, so illegally demanded of, and under protest paid by the said plaintiff as aforesaid, and being so liable, the said defendant afterwards, to wit, on the day and year and at the district aforesaid, in consideration thereof, undertook, and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money when he, the said de-
8 fendant, should be thereunto afterwards requested.

And, whereas, also the said defendant afterwards, to wit, on the same day and year and at the place last aforesaid, became and was indebted to the said plaintiff in the further sum of three hundred thirty-nine & $\frac{90}{100}$ dollars, like lawful money as aforesaid, for money by the said defendant before that time had, and received to and for the use of the said plaintiff; and being so indebted, the said defendant afterwards, to wit, on the day and year and at the district last aforesaid, in consideration thereof, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned whenever the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc.) has not paid the said several sums of money above specified, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant hath hitherto wholly neglected and refused and still does so neglect and refuse to the damage of the said plaintiff in the sum of five hundred dollars and, therefore, the said plaintiff brings his suit, &c.

P. L. SHUMAN,
Plaintiff's Attorney.

(Endorsed:) Filed Feb'y 16, 1886. Wm. H. Bradley, clerk.

9 Afterward, to wit, on the twenty-fourth day of February, 1886, came the defendant, by his attorney, and filed in said clerk's office his appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

United States circuit court northern district of Illinois.

D. CASTRO
vs. } No. 20041. Assumpsit.
SPALDING, COLLECTOR, &C.

The appearance of Jesse Spalding, defendant, in this cause, is hereby entered by his attorney.

R. S. TUTHILL,
United States Attorney.

(Endorsed:) Filed Feb'y 24, 1886. Wm. H. Bradley, clerk.

10 Afterward, to wit, on the twenty-eighth day of June, 1886, came the defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

In the circuit court of the United States of America for the Northern district of Illinois.

SPALDING, COLLECTOR, &C., *ats.* D. CASTRO. } No. 20041. Assumpsit.

And the said defendant, by R. S. Tuthill (United States attorney for this district), his attorney, comes and defends, etc., when, etc., and says that he did not undertake or promise in manner and form as the said plaintiff has above thereof complained against him; and of this the said defendant puts himself upon the country, etc.

R. S. TUTHILL,
U. S. Attorney for defendant.

(Endorsed:) Filed, June 28th, 1886. Wm. H. Bradley, clerk.

11 Afterward, to wit, on the fourth day of April, in the adjourned March term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

D. CASTRO *vs.* JESSE SPALDING, COLLECTOR, &C. } Assumpsit.

Now, come the parties, by their attorneys, and upon issue joined herein, thereupon comes a jury of good and lawful men, to wit, E. M. Donohue, John A. Rolfe, Julius Jonas, S. A. Albertson, Julius Ludwig, Samuel Davidson, Thomas Hurlstone, I. P. Nudd, George McKinney, S. J. Block, Matt. Kilborg, and W. M. Brown, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and receiving the instructions of the court, the jury returned the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess his damages at three hundred and thirty-nine dollars and ninety cents.

12 Afterward, to wit, on the fourteenth day of June, in the adjourned May term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

D. CASTRO *vs.* JESSE SPALDING, COLLECTOR, &c. } Assumpsit.

On motion of the plaintiff, by his attorney, for judgment herein it is thereupon considered and adjudged by the court that said plaintiff do have

and recover of said defendant the said sum of three hundred and thirty-nine dollars and ninety cents, his damages, with interest from time of payment, together with his costs in this behalf, amounting to thirty-two dollars and eighty-six cents. And the court finds that there was probable cause for the acts done herein by said defendant, and orders that execution do not issue herein.

13 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Defendant's bill of exceptions.

In the circuit court of the United States of America for the northern district of Illinois, northern division.

DANIEL CASTRO
vs.
JESSE SPALDING, LATE COLLECTOR, &c. } Assumpsit.

Be it remembered that upon the trial of this cause before his honor Henry W. Blodgett, judge, and a jury, the plaintiff, to maintain the issues on his side, introduced evidence tending to show that the tobacco, the question as to the classification of which for duty is presented in this suit, was what is known to the trade as "scrap tobacco," being composed of fragments or pieces, broken off or cut off in the manufacture of cigars, and scraps from the tables of cigar-makers, and that it had yet to undergo some process by which it could be put into form for consumption, and that it was used either as a filling for cheap cigars or worked into some kind of smoking tobacco or into cigarettes, and thereupon the

14 court instructed the jury that if they believed from the evidence that the tobacco in question required to have labor expended upon it in order to fit it for consumption, then it was unmanufactured tobacco, as claimed by the plaintiff, and was not manufactured tobacco or dutiable as such, as maintained by the defendant, and so assessed by him; and that a verdict, should then be rendeced for the plaintiff, to which instruction to the jury the defendant by his counsel then and there duly excepted.

And thereupon the jury rendered a verdict against the defendant and for the plaintiff, whereupon the defendant by his counsel then and there moved the court to set aside the verdict so rendered and grant a new trial of this cause, but the court denied the motion and gave judgment upon the verdict against said defendant, to which decision of the court in denying such motion the defendant by his counsel then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, which is done accordingly.

H. W. BLODGETT, [SEAL.]
Judge.

(Endorsed:) Filed Aug. 25, 1890, as of June 14, 1889. Wm. H. Bradley, clerk.

15 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein D. Castro is plaintiff, and Jesse Spalding, late collector of customs for the port and district of Chicago is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, northern division, this twenty-sixth day of August, 1890.

[SEAL.] WM. H. BRADLEY,
Clerk.

16 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between D. Castro and Jesse Spaulding, late collector of customs for the port and district of Chicago, in an action of assumpsit, a manifest error hath happened to the great damage of the said Jesse Spaulding, late collector of customs for the port and district of Chicago, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1890, in the Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of February, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Indorsed:) Supreme Court of the United States. Jesse Spalding, late collector of customs for the port and district of Chicago, plaintiff in error, vs. D. Castro, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S. northern district of Illinois.

17. UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To DANIEL CASTRO, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Daniel Castro is plaintiff and Jesse Spalding, late collector of customs for the port and district of Chicago, is defendant, to show cause, if any there be, why the error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge, this twelfth day of February, in the year of our Lord one thousand eight hundred and ninety.

H. W. BLODGETT,
Judge.

Service accepted.

PERCY L. SHERMAN,
Atty. for Deft. in Error.

2–12–'90.

(Indorsed:) 20041. Supreme Court of the United States. Daniel Castro vs. Jesse Spalding, coll'r. Citation. To October term, A. D. 1890.

(Indorsed on cover:) No. 297. Jesse Spalding, late collector of customs for the port and district of Chicago, plaintiff in error, vs. D. Castro. 14339. N. Illinois. C. C. U. S. Filed October 18, 1890.

FILED.
MAR 8 1894
JAMES H. McKENNEY,
CLERK

Cases Nos. 14338 and 14339.

In the Supreme Court of the United States.

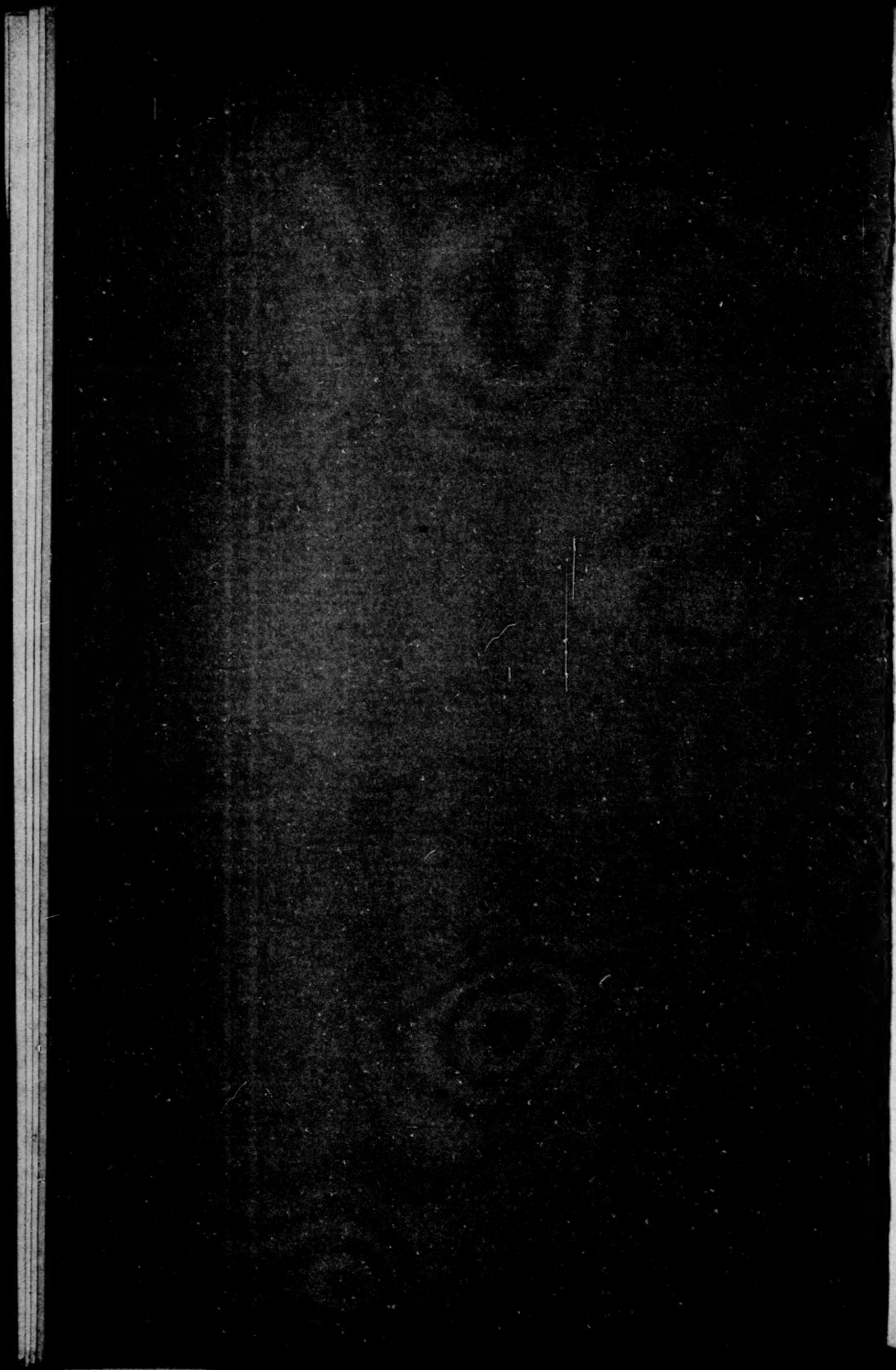
OCTOBER TERM, 1893.

ANTHONY F. SEEBERGER, COLLECTOR for the district of Chicago, plaintiff in error,
v.
DANIEL CASTRO. } No. 296.

JESSE SPALDING, COLLECTOR FOR the district of Chicago, plaintiff in error,
v.
DANIEL CASTRO. } No. 297.

IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFFS IN ERROR.



Cases Nos. 14338 and 14339.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ANTHONY F. SEEBERGER, collector for the district of Chicago, plaintiff in error,
v.
DANIEL CASTRO. } No. 296.

JESSE SPALDING, collector for the district of Chicago, plaintiff in error,
v.
DANIEL CASTRO. } No. 297.

IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFFS IN ERROR.

These are both actions brought to recover duties collected. The articles in question in each were scrap tobacco. The importations were made in 1886 and 1889, so that both actions are governed by the tariff act of 1883.

The main question at issue in each was whether the articles in question were manufactured or unmanufactured tobacco.

STATEMENT OF FACTS.

The *Seeberger* case was tried before Judge Blodgett without a jury, upon written stipulation (p. 6). The articles in question are described as follows in the findings of fact filed by the court:

> [1] *Clippings from the ends of cigars*, and [2] *pieces broken from the tobacco of which cigars are manufactured* in the process of such manufacture.
>
> Said clippings and pieces are *not fit for any use* in the condition in which the same are imported.
>
> *Their only use* is to be manufactured into cigarettes and smoking tobacco (p. 10).

The court further finds as conclusion of law that *all* this tobacco is unmanufactured within the meaning of the tariff act, and accordingly awards judgment to the plaintiff, Castro, *for the full amount.*

The *Spalding* case was tried by Judge Blodgett with a jury. The facts proved are stated as follows in the bill of exceptions (p. 6):

> The tobacco * * * was what is known to the trade as "scrap tobacco," being composed of fragments or pieces broken off or cut off in the manufacture of cigars, and scraps from the tables of cigar-makers.
>
> It had yet to undergo some process by which it could be put into form *for consumption.*
>
> It was [1] either used as a filling for cheap cigars, [2] or worked up into some kind of smoking tobacco or into cigarettes.

The sole exception is to the following instruction by the court to the jury:

> That if they believed from the evidence that the tobacco in question required to have labor expended upon it in order to fit it for consumption, then it was unmanufactured tobacco as claimed by the plaintiff, etc.

In the *Seeberger* case a point was also raised as to the capacity of the plaintiff to sue, a point stated and discussed under IV, *infra*.

ASSIGNMENT OF ERRORS.

Defendant assigns as error in the *Seeberger* case the finding of law that the tobacco should have been assessed for duty as tobacco unmanufactured, and the award of judgment against him for $254.61. In the *Spalding* case defendant assigns for error the instruction aforesaid, which was duly excepted to upon the trial.

I.

It is submitted that scrap tobacco in a partly manufactured state is manufactured tobacco and not unmanufactured tobacco within the meaning of the tariff act of 1883.

Omitting the special provisions relating to cigars, cigarettes, cheroots, leaf tobacco, tobacco stems, snuff, and snuff powder, the provisions for duty on tobacco are (paragraphs 249, 251):

> Tobacco, manufactured, of all descriptions, and stemmed tobacco, not specially enumerated or provided for in this act, 40 cents per pound.
>
> Tobacco, unmanufactured, not specially enumerated or provided for in this act, 30 per centum ad valorem.

It will be noticed that the act mentions only manufactured and unmanufactured tobacco. It does not specifically provide for tobacco partly manufactured. The question, therefore, is: Is a partly manufactured article a manufactured or unmanufactured article within the meaning of the tariff law? Partly manufactured articles are specified in many clauses of the act and classed, for the purposes of the tariff, with those which are wholly manufactured: as in the case of iron and steel (154, 160–67, 179, 184), metals in general (216), clothing (366–7), gloves (436), umbrella sticks and frames (492); also barks, etc. (94) and crude minerals (95). Special provisions were regarded by the lawmakers as necessary for smaller scraps or broken pieces in the case of iron and steel (145), copper (186), lead (189), glass (707), and paper (754). Receivers for the consumer is not the test of a manufactured article (*Erhardt* v. *Hahn*, 55 Fed. Rep., 273, 275). No conclusive indication, however, is given by the tariff act, nor is there any authority sufficiently in point to govern this case. The cases relating to scrap iron and steel (*Schlesinger* v. *Beard*, 120 U. S., 264, and *Robertson* v. *Perkins*, 129 U. S., 233) arose under peculiar provisions.

In the case of tobacco, however, we are not confined to the tariff act for provisions *in pari materia*. Tobacco comes not only under the tariff, but also under the internal-revenue legislation, and the two have always gone hand in hand as part of the same general fiscal system. It is, therefore, proper to examine the internal-revenue statutes for analogies; and by them the doubts are entirely clari-

fied, for they expressly include scrap tobacco, whether ready for consumption or not, within the general definition of manufactured tobacco.

The act of July 20, 1868, ch. 186, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," contains the following provisions:

> SEC. 61. That upon tobacco and snuff which shall be *manufactured and* sold, or removed *for consumption or use*, there shall be assessed and collected the following taxes: * * * On all refuse scraps and sweepings of tobacco, a tax of 16 cents per pound.
>
> SEC. 62. That * * * all *manufactured tobacco* shall be put up and prepared by the manufacturer for sale, or removal for sale or consumption, in packages of the following description, and in no other manner: * * * all smoking tobacco, all fine cut shorts which is passed through a riddle of 36 meshes to the square inch, and all refuse scraps and sweepings of tobacco, in packages containing 2, 4, 8, and 16 ounces each. (15 Stat., 152–3.)

Section 59 of the same act (15 Stat., 152) recognizes as manufactured tobacco articles not yet in condition for consumption by the smoker.

> Every person whose business it is to manufacture tobacco or snuff for himself, or who shall employ others to manufacture tobacco or snuff, *whether such manufacture shall be by* cutting, pressing, grinding, crushing, or rubbing of any leaf or raw tobacco, or *otherwise preparing* raw or leaf tobacco *or manufactured or partially manufactured tobacco*, or snuff, or *the putting up for use or consumption of scraps, waste, clippings*, stems, or deposits of tobacco, resulting from any process of handling tobacco, shall be regarded as a manufacturer of tobacco.

It will be noticed that this section treats clippings as neither raw, partly manufactured, nor wholly manufactured; but it shows that the word "manufactured" does not necessarily denote arrival at the final stage for consumption, while the sections first above cited show that it includes the scraps and clippings involved in the case at bar.

The above provisions are incorporated in the Revised Statutes as follows: §§ 3244 (ninth), 3362, 3368.

The *Act of March* 1, 1879, ch. 125, § 14 (20 Stat., 345), provides a substitute for § 3362 of the Revised Statutes, but still includes "refuse scraps, clippings, cuttings, and sweepings of tobacco" under the heading of "manufactured tobacco." This substitute for § 3362 is still the law, and is expressly referred to as such by the tariff act of October 1, 1890, ch. 1244, § 31; and scrap tobacco is "manufactured tobacco," by express reference, under the internal-revenue provisions of that act.

So held under act of 1890. in Sheldon. v. U. S. 55 Fed Rep 818

The provisions of the act of 1868 were considered by Attorney-General Brewster in his opinion of January 25, 1884 (17 Op., 646), and he applied their analogy in construing the tariff act now under consideration. This opinion and the statutory provisions therein referred to do not seem to have been called to the attention of the court in the case which settled the question here at bar adversely to the Government in the Illinois circuit. (*Cohn* v. *Spalding*, 24 Fed. Rep., 19.)

II.

The *Seeberger* case must therefore be reversed and a new trial ordered.

Some of the articles therein concerned are clippings from the ends of cigars—that is, manufactured or partly manufactured tobacco.

It may be a proper inference from the findings that the suit involved also unmanufactured tobacco—that is, broken pieces of the raw tobacco leaf. In that case plaintiff should perhaps have had judgment for some amount, although a smaller amount than that actually awarded him. The findings, however, did not distinguish between the raw and the partly or wholly manufactured material, and are not, therefore, sufficiently definite to enable this court to direct judgment for the correct amount. A *venire de novo* is therefore necessitated. (*Saltonstall* v. *Birtwell*, 150 U. S., 417, and cases cited.)

III.

The *Spalding* case must also be reversed. It establishes the wrong test, namely, necessity of further preparation for the consumer.

IV.

The *Seeberger* case contains a further question, namely, the capacity of plaintiff in that case to sue. The court finds:

> That the plaintiff, D. Castro, did not himself import this tobacco, and was not himself the owner, consignee, or agent of the goods at the time they were classified and the duties imposed upon them by the collector, and did not take the appeal to the Secretary of the Treasury.

It finds that plaintiff purchased the goods while still in bond pending the appeal, and after the decision of the appeal paid the duties exacted.

Question was raised at the trial whether the plaintiff, not having had any interest in the goods when the appeal was taken, could properly bring this suit under the Revised Statutes, §§ 2931 and 3011. We do not discuss this question because we understand the decision of the lower court to be approved by this court in *Hager* v. *Swayne*, 149 U. S., 242, 246.

It is respectfully submitted that the judgments in both cases should be reversed and new trials ordered.

EDWARD B. WHITNEY,
Assistant Attorney-General.

O